Significant Index No. 0430.00-00

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
MAR 09 2008

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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

SE:T:EP:RA:A2

Re:

Plan =

Company =

Dear

This is in response to your request for a ruling on behalf of the Company concerning the application of section 402(a)(2) of the Pension Protection Act of 2006 (PPA '06) with respect to the Plan.

The Company is a commercial passenger airline. The Plan has a plan year that is the same as the Company's fiscal year -- April 1 to March 31.

PPA '06 revised the minimum funding standards of section 412 of the Internal Revenue Code and added a new section 430. Under section 412, as amended by PPA '06, a defined benefit plan that is not a multiemployer plan will be treated as satisfying the minimum funding standard for a plan year if the employer makes the minimum required contribution under section 430. Section 430 generally provides that the minimum required contribution for a plan year is determined, in relevant part, by amortizing any shortfall amortization base (as defined) over a period of 7 plan years[1]. Under section 402(a)(2) of PPA '06 an eligible plan may elect to have section 430 of the Code applied to its first taxable year beginning in 2008 by amortizing the shortfall amortization base for such taxable year over a period of 10 plan years (rather than 7 plan years)

[1] Part 3 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) as amended contains parallel provisions.

beginning with such year. Under section 402(c) of PPA '06, an eligible plan includes a defined benefit plan which is sponsored by a commercial passenger airline.

Section 402(d)(1)(B) of PPA '06 provides that an election under section 402(a)(2) to use this special 10-year amortization schedule shall be made not later than December 31, 2007. Section 402(d)(2) of PPA '06 provides that the plan sponsor shall make any election under section 402(a) "in such manner as the Secretary of the Treasury may prescribe."

The Service issued Announcement 2008-2 2008-3 IRB 307, which provided for a specific written election to be made and submitted to the Service by the airlines by the statutory due date, December 31, 2007. Announcement 2008-2 was published in the January 22, 2008 issue of the Internal Revenue Bulletin (IRB 2008-3)[2]. The Company represents that it relies on outside pension professionals, including attorneys and actuaries, for advice concerning the funding of the Plan. The ruling request states that the Chairperson of the Company's Plan Committee "is not an attorney and has no technical expertise regarding federal tax or pension law."

According to the information submitted, in May, September, and October 2007, the content of presentations made to the Company by the Plan's consulting actuary assumed that the 10-year amortization election of section 402(a)(2) of PPA '06, would apply. In such presentations, the Plan's consulting actuary further suggested that the Plan was "still awaiting regulations that will clarify the airline relief" provided under section 402(a). The Company has represented that the actuary's projections of contributions made on the basis of the 10-year amortization election were used in planning for pension expenses.

Immediately upon becoming aware of the release of Announcement 2008-2, the Company filed the prescribed election form complying with the requirements of the announcement. The Company's election form is dated January 11, 2008. Furthermore, the filing in accordance with Announcement 2008-2 was made shortly after the release of Announcement 2008-2 and prior to its publication in IRB 2008-3.

Upon being informed that their election form complying with Announcement 2008-2 was late, the Company's representatives requested a meeting with the Service. Then, on March 7, 2008, the Company submitted a formal, written request that the Company be granted an extension of time to make the election under section 402(a)(2) of PPA '06. Specifically, the ruling requested was that the Company be granted additional time to make the election under sections 301.9100-1 through 301.9100-3 of the Income Tax

[2] Announcement 2008-2 was released to the media on Friday, December 21st.

Regulations. Alternatively, the Company asserts that the election should be considered timely under the substantial compliance doctrine.

Treasury Reg. §§ 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make regulatory or certain statutory elections.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(b) defines the term "statutory election" as an election whose due date is prescribed by statute.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time under the rules set forth in sections 301.9100-2 and 301.9100-3 of the regulations to make a regulatory election, or certain statutory elections under Subtitle A of the Code if the taxpayer demonstrates to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting the relief will not prejudice the interests of the government.

Section 301.9100-2 lists certain regulatory and statutory elections for which automatic extensions of time to file are granted. Section 301.9100-3 generally provides guidance with respect to the granting of relief with respect to regulatory elections not referenced in section 301.9100-2. The relief requested in this case is not referenced in section 301.9100-2.

Section 301.9100-3 of the regulations provides that applications for extensions of time for regulatory elections will be granted when the taxpayer provides sufficient evidence (including affidavits described in section 301.9100-3(e)(2)) to establish that (1) the taxpayer acted reasonably and in good faith, and (2) granting relief would not prejudice the interests of the Government. Rules for determining whether such tests have been met in the case of regulatory elections are set forth in sections 301.9100-3(b) and 301.9100-3(c), respectively.

The substantial compliance doctrine is an equitable one designed to avoid hardship in cases where the party does all that can reasonably be expected, and can be applied only where invocation thereof would not defeat the policies of the underlying statutory provisions. Sawyer v. County of Sonoma, 719 F.2d 1001, 1008 (9th Cir. 1983).

The Commissioner "may insist upon full compliance with his regulations" (*Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296 (1945)) when the regulatory requirements relate to the substance or essence of a statute. *See* *Penn-Dixie Steel Corp. v. Commissioner*, 69 T.C. 837 (1978); *Dunavant v. Commissioner*, 63 T.C. 316 (1974); *Thorrez v. Commissioner*, 31 T.C. 655 (1958), affd. per curiam 272 F.2d 945 (6th Cir. 1959). However, under the doctrine of substantial compliance, where taxpayers have not complied with all of the requirements of an election provision of the statute or regulations, an election may nevertheless be deemed to have been made by the taxpayer if the requirements that have not been satisfied do not relate to the "substance" or "essence" of the applicable election. *See* *Wilkinson v. Commissioner*, T.C. Memo. 1993-463 (1993). Thus, substantial compliance with regulatory requirements may suffice when such requirements are procedural and when the essential statutory purposes have been fulfilled. *Taylor v. Commissioner*, 67 T.C. 1071 (1977); *Hewlett-Packard Co. v. Commissioner*, 67 T.C. 736 (1977); *Columbia Iron & Metal Co. v. Commissioner*, 61 T.C. 5 (1973). Stated similarly, the district court in *True v. United States*, 142 F.Supp.2d 1313 (D. Wyo. 2001), ruled that the first step in an analysis of substantial compliance is to determine "whether the [election] requirements are mandatory in nature, or merely procedural details established to facilitate the Commissioner's administration of the Internal Revenue Code." See also *American Air Filter Co. v. Commissioner*, 81 T.C. 709 (1983) (In the case of a regulation that requires an election to be made by attachment of a statement to a return, the inquiry should be into whether the statement "merely confirmed the election which had been made in substance" or was the very essence of the election.)

Factors that courts have used in determining whether strict compliance as opposed to substantial compliance is required include whether the taxpayer's failure to comply fully defeats the purpose of the statute; whether the taxpayer attempts to benefit from hindsight by adopting a position inconsistent with his original action or omission; whether the Commissioner is prejudiced by the untimely election; whether the sanction imposed on the taxpayer for the failure is excessive and out of proportion to the default; and whether the regulation provided with detailed specificity the manner in which an election was to be made. *American Air Filter Co. v. Commissioner*, 81 T.C. 709, 719-720 (1983); *Taylor v. Commissioner*, 67 T.C. 1071 (1977); *Columbia Iron & Metal Co. v. Commissioner*, 61 T.C. 5 (1973); *Denman Tire & Rubber Co. v. Commissioner*, 14 T.C. 706 (1950), affd. 192 F.2d 261 (6th Cir. 1951).

In its ruling request, the Company asserts that it should be treated as having made a timely section 402(a)(2) election because it qualifies for relief under sections 301.9100-1 through -3 of the regulations or, in the alternative, because it should be treated as having made a timely election, based on the facts and circumstances, in accordance with the substantial compliance doctrine.

Initially, the Company's ruling request seeks relief under the provisions of § 301.9100-1 through -3 of the regulations. Under those rules, the Commissioner may grant a reasonable extension of time to make a regulatory election or certain statutory elections under Subtitle A of the Code.

Section 402(d)(1) of PPA '06 states that an election under subsection 402(a)(2) of PPA '06 shall be made not later than December 31, 2007, and that any such election shall be made in the manner as the Secretary of the Treasury may provide. The Company attempts to frame this due date as regulatory based on the provisions of Announcement 2008-2. The Company argues that the election due date is set forth in the announcement and, thus, should be treated as a regulatory election.

Because the due date for an election under section 402(a)(2) of PPA '06 is expressly prescribed by the statutory provision, the election is by definition a statutory election within the meaning of section 301.9100-1(b) of the regulations. Additionally, there are no regulations, revenue rulings, revenue procedures, notices, or announcements that purport to prescribe the due date for a 402(a)(2) election. Announcement 2008-2 did not dictate the due date for the election, but simply restated the statutory due date with reference to PPA '06 section 402(d)(1)(B). The due date in this instance cannot be determined without reference to statute. The mere incorporation of a statutory due date in an announcement does not change a statutory election into a regulatory election.

While the Service has broad authority under section 301.9100-3 to grant relief in the case of a regulatory election, section 301.9100-3 does not apply in the case of a statutory election. Furthermore, the statutory election at issue is not one of the enumerated elections set forth in section 301.9100-2 of the regulations.

Accordingly, the Service does not have the authority under sections 301.9100-1 through -3 of the regulations to grant an extension to the statutory election date of December 31, 2007 as set forth in section 402(d)(1)(B) of PPA '06[3].

The Company also argues that, under the substantial compliance doctrine, it has satisfied the election requirements in order to use the special funding rule in section 402(a)(2) of PPA '06.

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[3] Because we have concluded that relief is not available under section 301.9100-1 through 310.9100-3 of the regulations, we need not address the issue of whether such relief could apply to Title I of ERISA.

The Company argues that its (and its actuary's) actions during 2007, and its prompt (though tardy by less than two weeks) election filing, should be treated as rising to the level of substantial compliance with the election requirement. The Company's planning and internal budgeting, including several meetings and exchanges of correspondence with the Plan's actuary, all contemplated that the 10-year amortization election under section 402(a)(2) of PPA '06 would apply to the Plan with respect to post-PPA '06 plan years.

Section 402(d)(1)(B) of PPA '06 provided that an election under section 402(a)(2) of PPA '06 must be made not later than December 31, 2007. PPA '06 section 402(d)(2) provides that "[a] plan sponsor shall make any election under subsection (a) in such manner as the Secretary of the Treasury may prescribe.

The statute's proviso that "Treasury may prescribe" a manner in which to make the section 402(a)(2) election indicates that Congress authorized but did not require Treasury to issue specific election-related guidance. However, Announcement 2008-2, 2008-3 I.R.B. 307, sets forth the procedures for electing the alternative funding schedule under section 402(a)(2) of PPA '06. The Appendix to Announcement 2008-2 contains a model fill-in-the-blank election form as well as the address to which the election must be sent. The announcement was published in the January 22, 2008, issue of the Internal Revenue Bulletin, but was released to the media on December 21, 2007.

Prior to the release of Announcement 2008-2, the Company did not have any guidelines as to how to make an election under section 402(a)(2) of PPA '06. The materials submitted by the Company indicated that at least as early as May 31, 2007, the Company and its advisors were proceeding as if an election to use the 10-year amortization method applied to the Plan and that the Company and its advisors were awaiting regulations that would clarify the airline relief under section 402(a) of PPA '06 in order to file a formal election.

In this case, the Company's signed election form pursuant to Announcement 2008-2 was made prior to the start of the first plan year for which the election applied, since such plan year began on April 1, 2008. In addition, the Company stated that neither the circumstances of the Company nor the Plan had materially changed in any relevant respect from December 31, 2007 to January 11, 2008.

A late filing meets the test of "substantial compliance" if circumstances mitigate the taxpayer's belated filing. *Rickey v. United States*, 592 F.2d 1251 (5th Cir. 1979). See also *United States v. Van Keppel*, 321 F.2d 717 (10th Cir. 1963); *Fehrs v. United States*, 556 F.2d 1019 (Ct.Cl.1977). Here, the Company fulfilled the essential purpose of the election requirement in order to use the special funding rule of section 402(a)(2) of PPA '06. The information furnished is that the plan's financial affairs, both internally and in discussions with the plan's enrolled actuary, were administered as if the election applied to the Plan. Announcement 2008-2 was released on a Friday and was published by the tax press the following week (Because December 24th and 25th were Government holidays, the announcement was typically not published by the tax media until December 26, 2009.) Given the holiday season and the relatively few business days, it is somewhat understandable that the Company and its consultants could not react in a timelier manner to the announcement.

Moreover, the facts do not suggest that the Company is attempting to benefit from hindsight by seeking to have its election recognized, nor would the Commissioner be prejudiced by recognition of the Company's election. On the other hand, to preclude recognition of the Company's funding election in these circumstances would punish the Company inordinately under the circumstances, particularly in light of the timing of issuance of Announcement 2008-2, and the plan year of the Plan.

Accordingly, we conclude based on the forgoing facts, information and representations, that section 9100 relief is not available to the plan in this instance. However, in light of the unique facts and circumstances presented in this matter, the Company made a timely election to utilize the special funding rule set forth in section 402(a)(2) of the Pension Protection Act of 2006 ("PPA '06") pursuant to the substantial compliance doctrine. Thus, the shortfall amortization base established as of April 1, 2008, may have an amortization period of 10 plan years.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

When filing Form 5500 for the plan year beginning April 1, 2008, enter on an attachment to the Schedule SB (Actuarial Information) the date of this letter and label the attachment "**Schedule SB Line 27 – Alternative Funding**".

If you have any questions regarding this matter, please contact me
at

Sincerely yours,

David M. Ziegler, Manager
Employee Plans Actuarial Group 2